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Supreme Court Decisions

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FAIR TRADE LAW—PLEADING—CONSTITUTIONAL LAW—*People v. Barksdale*—No. 14347—*Decided February 20, 1939—District Court of Pueblo County—Hon. W. B. Stewart, Judge—Reversed.*

HELD: 1. The trial court had jurisdiction of defendant and of the subject matter in a suit brought on the relation of the Attorney General to restrain defendant from violating Chapter 113, S. L. 1937, being "an act relating to the regulation and supervision of the cleaning and dyeing trade in the State of Colorado." The defendant was charged with having violated the provision which requires those in the industry to demand for their services not less than the schedule of minimum retail prices established by the Industrial Commission.

2. Complaint examined and found to state cause of action.

3. A presumption of validity attaches to all legislation passed by the General Assembly, and the presumption abides unless it is shown, beyond a reasonable doubt, to be false.

4. The statement that the act was not properly passed by the General Assembly, without alleging ultimate facts, is a bare legal conclusion, for nothing appears on face of complaint to so show.

5. The contention that the "General Assembly has unlawfully delegated legislative authority to the Industrial Commission is so contrary to all sound decisions with reference to the administrative phase of modern social and economic legislation that no authorities need be cited."

6. The issue of invalidity on constitutional grounds should be presented by an affirmative pleading.

7. The trial court should not admit evidence while considering a demurrer.

Opinion by Mr. Justice Bouck. Mr. Justice Burke dissents. Mr. Justice Bakke and Mr. Justice Knous not participating. EN BANC.

WATER RIGHTS—*Otto Lumber Co. v. Water Supply Co.*—No. 14387—*Decided February 20, 1939—District Court of Larimer County—Hon. Frederic W. Clark, Judge—Affirmed.*

HELD: 1. "The Colorado Statutes providing for the adjudication of water priorities and for changing points of diversion are in the nature of police regulations. 1935 C. S. A., c. 90. The sworn duty of our irrigation officers—the State Engineer, the irrigation division engineers, and the water commissioners—is to give statewide enforcement to those statutes. Decreed rights to use water diverted by irrigation ditches in our State are of course intended by our General Assembly to be supervised and administered by the irrigation officers in a way that will

impartially secure the enjoyment of these rights by the various users in relation to one another."

2. No valid reason is assigned by the petitioner for taking its Colorado-decreed water out of the stream after it has reached Wyoming, thus depriving Colorado of the power to continue undiminished the exercise of its legitimate jurisdiction over the petitioner, as over all other users to whom rights have been judicially awarded by our state.

Opinion by Mr. Justice Bouck. EN BANC.

WATER ADJUDICATION — REOPENING — LIMITATION — *The Great Western Reservoir and Canal Company v. Farmers Reservoir and Irrigation Company, et al.*—No. 14305—*Decided February 6, 1939—Error to the District Court of Boulder County. Hon. Claude C. Coffin, Judge—Judgment Affirmed.*

FACTS: Plaintiff in error filed petition to reopen a water adjudication decree on January 5, 1937, relying on sec. 187, ch. 90, 1935 C. S. A. for the right so to do. An answer, including a general demurrer, was addressed to the petition, and after hearing on petition and answer, the demurrer was sustained and petition dismissed.

Adjudication proceeding was instituted in October, 1912, and first decree entered June 21, 1926, and a last decree was on January 9, 1935.

In the proceedings to reopen it was undisputed in the record that the decree "complained of" by petitioner was that entered June 21, 1926. But the provision of the statute relied on provides in part that there is a two-year period for review and reargument of "the decree complained of."

HELD: Decree of June 21, 1926, was final as to the question presented by the petition of plaintiff in error.

Opinion by Mr. Justice Bock. Mr. Justice Hilliard and Mr. Justice Bouck concur. IN DEPARTMENT.

ACCOUNTS — CHECKS — INTEREST — PAYMENT — *Smith-McCord-Townsend Co. v. Camenga*—No. 14351—*Decided February 20, 1939—District Court of Denver—Hon. George F. Dunklee, Judge. Affirmed.*

HELD: 1. Where one party presents to another a bill for a book-account of a certain amount, and the other makes a series of payments thereon and then sends another check containing the words "acc't. in full," which check is accepted, and no objection made thereto for two weeks, there is a complete settlement of the account, barring fraud and mistakes.

2. Two weeks under such circumstances was an unreasonable length of time to delay making an objection or protest if the check were not to be accepted for what it purported to be.

3. The trial court was right in assuming, apparently, that it is the business of the credit manager of a mercantile corporation to be conversant with matters relating to a check paid on an account and containing the words "acc't. in full."

4. Where interest on past due accounts is never segregated and charged on the company's books, the payment by check stating, "acc't. in full," and the acceptance of same precludes further charge for interest.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Hilliard and Mr. Justice Burke concur.

STATE—SUIT AGAINST—TORT—EMINENT DOMAIN—*The State of Colorado v. The Colorado Postal Telegraph Co.*—No. 14463—*Decided May 29, 1939—District Court of Denver—Hon. George Dunklee, Judge—On application for supersedeas, judgment reversed.*

FACTS: 1. The company instituted suit against the state to recover $2,331.88 damages alleged to have been caused by reason of excavations at the state hospital which endangered line and poles of the company, necessitating their removal. Alternative prayer that company's damages be determined as in eminent domain proceeding by a commission of three freeholders or by a jury of freeholders.

2. Demurrer for insufficiency of facts, specifying: immunity of state to suit; no one authorized to, or who can, accept service on behalf of state; no way of satisfying a judgment except by appropriation.

3. Demurrer overruled, and state elected to stand therein. Judgment for company.

HELD: 1. The state cannot be sued in its own courts without its consent.

2. "Since counsel for plaintiff in the instant case admit the general rule to be that the state cannot be sued without its consent, and since they ground the exception to that rule which they claim permits the state to be sued solely on Section 15, Article II of the state Constitution as they contend it was construed in *County Commissioners v. Alder, supra,* overholding that that section of the Constitution relates merely to the matter of liability for an uncompensated taking or injury of property and that the matter of the county's liability is all that was in issue or determined in that case, leaves applicable the admitted general rule that the state, without its consent, cannot be sued."

Opinion by Mr. Justice Young. Mr. Justice Bouck and Mr. Justice Bakke not participating. EN BANC.

WORKMEN'S COMPENSATION—EVIDENCE—*White v. Industrial Commission*—No. 14572—*Decided May 15, 1939—District Court of Denver—Hon. Stanley H. Johnson, Judge—Affirmed.*

FACTS: W, general superintendent of employer company, was injured by the explosion of his own gun with which he was attempting

to kill a coyote. He claimed the animal was a "menace, nuisance and detriment to company operation." His claim for compensation was denied upon the ground that his injury did not arise out of and in the course of his employment.

HELD: 1. "Though all the evidence produced may come from the claimant, and viewed in its most favorable light, support an award for him, if it justifies adverse inferences which the commission clearly draws a contrary award will be upheld."

2. The commission is entitled to consider all admitted and self-evident facts in the case, and apply to those, and to claimant's theory of his employment and duties, the common knowledge of common men in this state.

Opinion by Mr. Justice Burke. Mr. Justice Young and Mr. Justice Bakke concur. IN DEPARTMENT.

ESTATES—INHERITANCE TAX—EXEMPTION—*People, ex rel. Rogers v. Colorado National Bank, etc.*—No. 14425—*Decided May 15, 1939—County Court of Denver—Hon. C. E. Kettering, Judge—Affirmed.*

HELD: 1. Where the widow, under the provisions of a will, held only a life estate, the amount of which was reasonably ascertainable; and where it appears that its value was less than the amount of her statutory exemption, and that the remainder was left for charitable purposes, the estate is exempt from the imposition of any inheritance tax.

2. Where there is no possibility, or probability, of invasion into the corpus of the estate, or if the amount passing to charity could be ascertained, no tax is to be paid.

3. "If the devise to charity is reasonably certain, no tax, under the facts, is due the state." Had the will, in its provisions for the maintenance for the widow for life, made the devise to charity mere guesswork and speculation, the tax would have been properly assessed.

4. The trial court correctly followed the principles laid down in *Ithaca Trust Co. v. United States*, 279 U. S. 151, 49 Sup. Ct. 291, 73 L. Ed. 647, as distinguished from the case of *Humes v. United States*, 276 U. S. 487, 48 Sup. Ct. 347, 72 L. Ed. 667.

Opinion by Mr. Justice Bock. Mr. Justice Burke and Mr. Justice Young concur. IN DEPARTMENT.

DIVORCE—CUSTODY OF MINOR CHILD—MODIFICATION OF PREVIOUS DECREE—ATTORNEY'S FEES—*Averch v. Averch*—No. 14568—*Decided May 15, 1939—District Court of Denver—Hon. George F. Dunklee, Judge—Reversed.*

FACTS: In 1935, divorce action between the parties culminated in a final decree by which mother of child was granted a divorce and

custody of the child for 42 weeks each year, with the privilege of taking child out of state. In 1935, father went to New York and, under the decree, obtained custody of the child for ten weeks and returned her to Denver where he was advised she needed an operation. The mother consented and the operation was performed. More medical services were needed and the father did not return the child to the mother in New York at the end of the ten weeks. The medical testimony showed that the child could be treated in New York. The trial court refused to hold the father in contempt and suggested that he file a petition seeking permanent custody of the child. The court denied mother's petition for custody and granted the father permanent custody until further order of the court.

HELD: 1. The general rule in cases involving the custody of minor children is that "the interest and welfare of the child is the primary and controlling question."

2. To deprive a parent of the custody of the child and to justify a modification of the decree previously awarding the custody to the mother for 42 weeks in each year, it is necessary that a change of circumstances be shown, or new facts presented, to justify the modification.

3. Courts will not deprive the mother of the custody of her child unless it is clearly shown that she is so unfit a person as to endanger the child's welfare.

4. Considering the evidence, the trial court was arbitrary and abused its discretion in modifying the decree.

5. The mother was entitled to attorney fees, reasonably expended in attempting to enforce the previous decree.

Opinion by Mr. Justice Bock. Mr. Justice Bouck not participating. EN BANC.

UNEMPLOYMENT COMPENSATION CONTRIBUTIONS — RULES AND REGULATIONS—AGRICULTURAL LABOR—*Park Floral Co. v. Industrial Commission*—No. 14455—*Decided May 15, 1939—District Court of Denver—Hon. George F. Dunklee, Judge—Affirmed.*

FACTS: Action instituted by Industrial Commission under the Colorado Unemployment Act to recover unemployment compensation contributions from the floral company upon the basis of wages paid by that company to its employees. The company contended that the labor of its employees comes within the exemption of the statute which provides that the "term 'employment' shall not include (D) agricultural labor."

HELD: 1. The Industrial Commission, acting within the scope of the rule-making authority conferred by the Act, defined the term "agricultural labor." Its regulation on such question is in keeping with the clear intent of the enactment.

2. "* * * That it may be claimed to be not entirely appropriate to an isolated and in some respects unique situation such as that pre-

sented here is no adequate ground for condemning a rule which in its general practical operation is not shown to be unreasonable or unjust."

3. The legislature, having declared the policies and fixed the primary standards, may validly confer on administrative officers power to "fill up the details" by prescribing rules and regulations to promote the spirit and purpose of the legislation and its complete operation.

4. In determining "agricultural labor," the place, the method and manner of production, as well as labor practices employed must be weighed.

5. The technical distinction that mushrooms are grown in darkness and the flowers grown and sold by the company are grown in light is of no consequence in this matter where the Act looks to the achievement of social security for labor and not to the classification of fruits of the soil.

6. The defendant floral company cannot escape the effect of the Act merely because it has some "seasonable" fluctuation of employment of some of its employees.

7. Greenhouses and retail stores of a floral company cannot be said to be "farms in the ordinarily accepted sense," and the company's employees are not to be classed as "agricultural labor."

8. The administrative rulings under the Federal Social Security Act, exempting the operations of greenhouses, are not controlling upon the state courts.

Opinion by Mr. Justice Knous. Mr. Justice Bouck not participating. EN BANC.

LIABILITY INSURANCE—SUIT BY INJURED PARTY AGAINST INSURER OF DEFENDANT—CONTRACTS—EVIDENCE—*Warner v. Farmer's Automobile Inter-Insurance Exchange*—No. 14548—*Decided May 15, 1939*—*District Court of Larimer County*—*Hon. Claude C. Coffin, Judge*—*Affirmed.*

FACTS: Plaintiff obtained judgment for damages against one H. The defendant insured H against liability and plaintiff sued defendant to collect the amount of the judgment. Defendant claimed that the policy had been cancelled ten days before the accident which caused the damages. The replication alleged waiver of premium and denied cancellation of policy. The trial court directed a verdict for the company.

HELD: 1. Evidence examined and found to leave no question for the jury as to the cancellation of the policy.

2. Subsection 9, Section 19, Chap. 87, Vol. 3, 1935 C. S. A., clearly exempts the company from obligations arising from any oral statements not in the contract.

Opinion by Mr. Justice Bakke. Mr. Justice Young and Mr. Justice Burke concur. IN DEPARTMENT.

REAL ESTATE—DEDICATION OF STREETS—NON-USER—FAILURE TO ACCEPT—DAMAGES—PLEADING—*Hunt v. Brewer, et al.*—No. 14567—*Decided May 22, 1939—District Court of Adams County—Hon. Samuel W. Johnson, Judge—Affirmed.*

FACTS: Plaintiff brought suit to enjoin defendants from misusing a street which she contends is dedicated to public use. The trial court dismissed the complaint. The original townsite was platted in 1889, but there never was an acceptance of the dedication. In 1933, the defendants subdivided and replatted certain blocks and vacated part of the street, recording a plat thereof. Plaintiff contends that she is the owner of two blocks between which the street extends and that she has an absolute legal right to have the avenue maintained as originally platted.

HELD: 1. A citizen, if likely to be injured in his individual rights with respect to his property by a misuser or diversion of dedicated property, may maintain an action to enforce or preserve the use. This right is not absolute, and may be lost by failure of acceptance and non-user in connection with other circumstances indicating an intent not to use the property for the purpose to which it was dedicated.

2. An acceptance of a dedication is necessary.

3. Where there has been no statutory dedication, but only a common law offer to dedicate the streets and alleys marked on a plat of a subdivision, and no acceptance or user of any portion of such streets and alleys, the execution and recording of proper deeds of vacation withdraws and cancels that portion of the plat included in such deeds.

4. Damages claimed are wholly prospective and speculative.

5. Plaintiff has ingress to and egress from her property through other streets.

6. In such cases, a mere allegation of irreparable injury is insufficient—the facts must be stated.

Opinion by Mr. Justice Bakke. Mr. Justice Young and Mr. Justice Burke concur. IN DEPARTMENT.

CRIMINAL LAW — ANTI-PICKETING LAWS — LABOR — CONSTITUTIONAL LAW—DAMAGES—*People v. Harris*—No. 14309—*Decided May 29, 1939—District Court of Denver—Hon. H. A. Hicks, Judge—Affirmed.*

FACTS: H charged in two counts with picketing. He pleaded not guilty, a jury was waived, and the case submitted on a stipulation of facts. He was adjudged not guilty and discharged. District Attorney sues out writ of error.

HELD: 1. "It is quite universally conceded now that labor has the right to organize and to lawfully protect its economic interests."

2. "By the great weight of authority, peaceful picketing, so long as it does not in fact involve fraud, intimidation, breach of the peace, or coercion, has been sustained in many cases."

3. "That the employer has the right to refuse to pay union wages and maintain union standards is conceded. Correspondingly, labor has the right to decline to carry on any business relation with such an employer. Any loss which occurs in such economic controversies is *damnum absque injuria.*"

4. Peaceful picketing for a lawful purpose is permissible.

5. A statute which is construed to prohibit peaceful picketing of any kind, at any time, at any place near the employer's premises, and in any manner, is unconstitutional as being in violation of the due-process-of-law provision contained in Amendment XIV of the United States Constitution.

6. This does not deprive the state from regulating the picketing.

7. The right to peacefully picket rests upon the right of free speech.

8. "Any legislative exercise under the police power which violates any right guaranteed by the national or state Constitutions is invalid."

9. "It cannot be successfully maintained that guaranties of freedom of speech are less important than guarantees relating to property."

Opinion by Mr. Justice Bock. Mr. Justice Bakke concurs specially. Mr. Justice Bouck not participating. EN BANC.

PUBLIC UTILITIES—CARRIERS—HIGHWAYS—POLICE POWER REGULATION—*McKay v. Public Utilities Commission, et al.*—No. 14320—*Decided May 29, 1939—District Court of Denver—Hon. Stanley H. Johnson, Judge—Affirmed.*

FACTS: The Public Utilities Commission found that the respondent trucker was operating as a common carrier in intrastate commerce without first having obtained a certificate of public convenience and necessity therefor, and it entered an order cancelling his private permit for having done so and requiring him to cease and desist from so continuing. The order of the commission included the provision that the respondent could retain his private permit if he paid a $200 penalty and ceased operating as a common carrier.

HELD: 1. Although the respondent and the commission joined in asking the Supreme Court, "in view of the confusion, growing pains and chaos of truck transportation in this state," to establish definite principles of conduct governing truck-carrier operations, the Supreme Court has no power to establish such principles. It may only ascertain the legislative intent and interpret the statutes and decide whether, under the facts and circumstances, the commission was authorized to enter the orders of which complaint is made.

2. Home rule cities are not under the authority of the Public Utilities Commission in the regulation of motor vehicle common carriers whose operations are limited to the municipal area.

3. There is a distinction between the private and public use of

highways. The right of the citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain. The former is the usual and ordinary right of a citizen, a common right, while the latter is special, unusual and extraordinary.

4. As to the common right, the legislative power is that of regulation; but as to the special right, the legislative power is broader, and the right may be wholly denied, or it may be permitted to some and denied to others.

5. "The legislative intent is clear, that the authorization of private carriers shall not be detrimental, within the limits of the law, to common-carrier operation. No permit as a private carrier can be granted by the commission if in its opinion, based upon proper evidence, such private-carrier operation impairs the efficient public service of an authorized common carrier serving the same territory or over the same highways or routes."

6. It is in the public interest to preserve common-carrier operation.

7. It is immaterial that there are inconsistencies between findings of the commission and those of the District Court on the evidence adduced before the commission, since the findings of the District Court were gratuitous. "Where the district court affirms the order of the commission, and if the latter does not exceed its authority, and the evidence sustains the orders, the findings of the court are immaterial."

8. "Indiscriminately accepting freight is undoubtedly one of the important tests in ascertaining whether or not a certain operation has the elements of a common carrier. The claim that one is a private carrier, regardless of volume and number of shippers served is erroneous."

9. One may not, on a private-carrier permit, operate a regular scheduled service with two trucks between Denver and Sterling five times weekly, have a freight dock at each terminal, have one-third of the volume of freight between Denver and Sterling, receive all freight offered for carriage except in a certain isolated instance, accept freight on joint through rates at Denver as well as Sterling from private and common-carrier operators, list joint motor vehicle carriers as customers, issue advertising cards and distribute them to prospective customers thereby holding himself out to the public as being engaged in the trucking business.

10. The law does not permit private carriers to accept freight originating on, or destined to points on, lines of connecting carriers, nor the transportation of such shipments on joint through rates or otherwise.

11. The contention that the practice of the respondent was commonly engaged in by other private carriers and that the practice had been condoned or tacitly approved by the commission is of no avail, for no power exists in a commission to approve any unlawful operation. "The doctrine of estoppel cannot be invoked against any governmental agency, acting in its public capacity."

12. It is unlawful for a private carrier to hold himself out to the public as authorized to transport indiscriminately as a common carrier without having first obtained a certificate of public convenience and necessity therefor, and where his advertising so holds him out to the public, he is guilty of the violation of the law.

13. It is proper for the Public Utilities Commission to find, if the facts so showed, that respondent was operating as a common carrier in interstate commerce and as a private carrier in intrastate commerce over the same route, at the same time, with the same equipment and under the same trade name.

14. "One cannot devote his property to a public use by utilizing one part of his truck for common-carrier service and another part of the same truck for private-carrier service."

Opinion by Mr. Justice Bock. Mr. Justice Bouck and Mr. Justice Bakke not participating. EN BANC.

WATER DISTRICTS—CONSTITUTIONAL LAW—LIENS—ESTOPPEL—*Home Owner's Loan Corporation v. Public Water Works District* —No. 14531—*Decided May 29, 1939—District Court of Pueblo County—Hon. William B. Stewart, Judge—Affirmed.*

FACTS: Action by Home Owner's Loan Corporation to restrain the defendant from refusing or failing to deliver water to and upon residence property in Pueblo, on which plaintiff held first deed of trust. The trial court sustained demurrer to complaint. The defendant district was organized under a special statute (S. L. 1905, Chapter 142), which gave the district a first lien for water assessments on property for which water is furnished and made such lien paramount to all liens except general taxes.

HELD: 1. Where it appears that a portion of an Act has been held unconstitutional, and that when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with apparent legislative intent wholly independent of that which was rejected, the balance of the Act must be sustained.

2. Where the title to the Act states that it is "to provide for the creation of public water works districts * * * and for the management of the same," such title includes the system of financing the district and the provision concerning the lien is certainly clearly germane to such system.

3. Where the statute provides that the water charges "shall become and be a continuing lien," unreasonable delay in shutting off the water for non-payment of water bills is a factor irrelevant to the enforcement of the lien in conformity with the enabling statute, and the doctrine of estoppel does not apply against the district.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Hilliard and Mr. Justice Bock dissent. Mr. Justice Bouck not participating. EN BANC.

CHAIN STORE LICENSE LAW—*Bedford, etc.v. Gamble-Skogmo, Inc.* —No. 14390—*Decided May 29, 1939*—*District Court of Denver* —*Hon. Robert W. Steele, Judge*—*Reversed.*

FACTS: The company, a Delaware corporation, with its principal office at Minneapolis, Minnesota, was engaged in business of selling merchandise and operated 230 retail stores in twenty northwestern states, five of which stores were operated in Colorado. In addition to these five stores, the company sells merchandise to certain locally owned stores in Colorado under a uniform contract agreement, by which these stores are given the right to use the name "Gamble Store Agency." The company claims that these agency stores were wholly individually owned, controlled and operated by the local agency operators and so contend there is no liability for the graduated license fees on multiple stores imposed by the Act (Chain Store License Act—Chapter 216, S. L. 1935). The state contends that the operation of the stores was "ultimately controlled" and "directed" by the company, and that they really constitute a chain of stores under the statute. The trial court decided in favor of the company.

HELD: 1. Where it appears that the agency stores operate under a uniform contract under which the company agrees to sell to the agency operator, at prices to be established by the company, such merchandise as the company carries in its own stores; where company agrees to make adjustments for any merchandise so sold which in the opinion of the company was defective at the time of sale; where it grants to the agency operator the right to paint his store with the distinguishing blue and orange colors used by the company on its "Gamble Stores"; where, upon request of operator, agrees to advise him relative to methods of merchandising, and, upon payment for same by him, agrees to furnish circulars and other advertising of the same general character used by the company in its regular stores; where the contract provides that, unless otherwise authorized in writing, the operator will purchase merchandise from the company at one of its stores within the state, and pay for the goods cash on delivery, etc., and that he will constantly exhibit the merchandise prominently; where the operator agrees to exercise his best efforts to maintain and increase sales of the company's merchandise, and is given the right to use the name of "Gamble Store Agency" to advertise that the local store is selling merchandise purchased from the company; where it appears that he shall not use the words "Gamble Stores," that he shall not designate such store as being owned, controlled, supervised, operated or maintained by the company, that he shall not have authority to make any binding agreement on behalf of company; where it appears that the contract may be terminated by either party on 30 days' written notice; and where it appears that upon termination of contract company may re-purchase merchandise purchased from it and may buy the fixtures in the store and take over the unexpired lease; and where certain other practices occur; it is clear that "on the one side there is an intimacy of regulation and on the other a fullness of submission which imports ultimate control in the company."

2. "Control" in a strict legal sense is not a requisite to the liability for the tax.

3. The conduct of such stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store.

4. The conclusion is irresistible that the purpose of the contract was to initiate a system from which both parties could reap all the advantages of chain store operation with immunity from the burdens thereof.

5. While there is a distinction between chain stores and a voluntary cooperative association of individual stores, the stores involved in this matter are construed to be chain stores within the meaning of the statute. "The element of mutuality between the agency store operators, fundamental in a true cooperative association, is wholly lacking."

Opinion by Mr. Justice Knous. Mr. Justice Bouck not participating. EN BANC.

MUTUAL DITCH COMPANIES—EQUITY—FINDINGS OF TRIAL COURT ON CONFLICTING COMPETENT TESTIMONY—PURCHASE OF OWN SHARES OF COMPANY—*Guadalupe Ditch Co., et al. v. Manassa Land and Irrigation Co.*—No. 14282—*Decided May 29, 1939—District Court of Conejos County—Hon. John I. Palmer, Judge—Affirmed.*

FACTS: Suit by Manassa Company to enjoin defendants from selling any of the shares of stock of defendant company held by plaintiff for the non-payment of assessments or charges on account of the shares of stock of the defendant company owned by the plaintiff company. Plaintiff, by reason of its stock ownership in defendant company, was entitled to 29.79 second-feet of water. With consent of plaintiff and defendant, a decree changing the point of diversion of such water was entered in a previous matter. At such time the defendant levied assessments on all the stock in the mutual ditch company for purpose of placing the ditch in good repair so as to more efficiently carry the diminished stream remaining. Plaintiff contended it had an agreement with defendant company that upon paying a large part of the assessments to so repair the ditch, the defendant company would not in the future look to the plaintiff company for assessments to further maintain a ditch from which it derived no benefits. The trial court held that there probably was such an agreement, but that the evidence as to its terms was insufficient to authorize a finding as to what they were. It appeared that later the plaintiff presented a request that it be given a quit-claim deed to the water it was diverting and that it be permitted to withdraw from defendant company. No action was taken on this proposal, although at subsequent annual meetings of the defendant company the matter was considered but no one knew how the withdrawal could be effected. At a still later meeting, the minutes show that it was agreed that upon payment of $600.00 of the assessments the plaintiff company be released from further assessments. The minutes state that the money was to be paid

within sixty days. Lower court held plaintiff was entitled to restraining order.

HELD: 1. The 60-day provision was to allow for the technical work of separating the plaintiff company's holdings from those of the defendant.

2. The finding of the lower court on competent though conflicting evidence that the understanding between the parties was that the $600.00 was to be in full settlement, not only of defendant's claim for assessments, but that the interest of plaintiff company was to be separated from the defendant company to avoid future controversies of the same nature, will not be disturbed.

3. All that Section 145, Chapter 41, 1935 C. S. A. requires, if what was done amounted in legal effect to a purchase by the defendant company of its stock representing water used by plaintiff company, is that the resolution of settlement be adopted at annual meeting by two-thirds of the stock, exclusive of the shares involved in the transaction. This was done.

Opinion by Mr. Justice Young. Mr. Justice Bouck, Mr. Justice Bock and Mr. Justice Burke not participating. EN BANC.

NEGLIGENCE—LAST CLEAR CHANCE—EVIDENCE—GUEST STATUTE —*Dwinelle, et al. v. U. P. R. R.*—No. 14379—*Decided July 3, 1939—District Court of Boulder County—Hon. Frederic W. Clark, Judge—Affirmed.*

HELD: 1. In an accident resulting in the death of a guest in a truck which was struck by a train, where it appears that the driver of the truck could and should have avoided the accident, the operator of the train is not responsible, for such facts establish primary negligence on the part of the driver of the truck and absence of primary negligence on the part of train operator.

2. Since the conduct of the driver of the truck was so inconsistent with all that was disclosed concerning the truck driver's duty, knowledge, skill and experience, the court cannot say that the jurors were precluded from assuming that he must for the time being have relinquished his seat to the passenger. If that in fact occurred, plaintiffs, as heirs of the guest, may not recover damages for primary or contributory negligence against either the owner of the truck or the owner of the engine.

3. The trial court did not err in taking the case against the railroad from the jury, since the evidence does not warrant the application of the last clear chance doctrine.

4. If the impending peril in which the parties found themselves was due entirely to the negligence of guest and truck driver, and yet was discovered by the engineer, or, in the exercise of reasonable care, ought to have been discovered by him, in time to avert the accident, the doctrine applies and the cause should have gone to the jury against the railroad—

but the undisputed evidence is that under existing conditions it would have been impossible for the engineer to have avoided the impact.

5. Where the evidence discloses a mere possibility that the engineer might have avoided the collision, and that that possibility rests on split seconds, it is not enough to meet the rule. "It may present a last, but not a clear, chance."

6. The court did not err in excluding testimony of plaintiff's witnesses as to possible effect of engineer's speed by sanding the rails, since the witnesses showed themselves unacquainted with the type of engine, its equipment, or manner of operation.

7. An affidavit as to what was stated in informal chambers conferences was properly stricken, since such conferences are not a part of the record of the trial.

8. The court did not materially err in admitting a statement made prior to accident by deceased guest in truck that his "family had turned him down." Plaintiffs contend that the admission was erroneous and highly prejudicial because the Act is not a survival statute, hence such declarations were not admissible against plaintiffs as heirs. The purpose of the Act, under which suit was brought, was to compensate those who suffer pecuniary loss by reason of the death. The error, if any, is trivial and not reversible, since the jurors were instructed that plaintiffs had no cause of action unless decedent would have had such if death had not ensued. If decedent had lived such statements against interest would have been admissible.

9. Evidence examined as to truck driver's intention, intoxication and willful and wanton disregard of decedent's rights, and found not to be such as to overcome the restrictions of the guest statute.

Opinion by Mr. Justice Burke. Mr. Chief Justice Hilliard and Mr. Justice Bakke concur. IN DEPARTMENT.

HEIRSHIP—ESTATES—DEPOSITIONS—NOTICE OF DEPOSITIONS TO PARTY ENTERING APPEARANCE SUBSEQUENTLY—*In the Matter of the Estate of John Webb*—No. 14398—*Decided June 12, 1939—District Court of La Plata County—Hon. John I. Palmer, Judge—Affirmed.*

FACTS: Claimants contend they are the heirs of Webb. County Court found Webb died without heirs. District Court reversed same and found claimants to be the heirs. Depositions used in the County Court before the state was a party were permitted to be used in the District Court.

HELD: 1. The evidence established the heirship beyond a doubt. The state's contention that the depositions could not be used against it because of the statutory provision for notice is not good because when the depositions were taken the state was not a party and not entitled to notice.

Opinion by Mr. Justice Burke. IN DEPARTMENT.

CONSTITUTIONAL LAW—LIENS FOR WATER—PRIORITY—*Home Owner's Loan Corporation v. Public Water Works*—No. 14531—*Decided May 29, 1939*—*District Court of Pueblo County*—*Hon. William B. Stewart, Judge*—*Affirmed.*

FACTS: Plaintiff, which held a first deed of trust upon residence property in Pueblo, sought to restrain defendant from refusing to deliver water to said residence. Defendant is a water district created under Act of 1905. Said Act provides that defendant's charges shall become and be a continuing lien upon the premises and be prior to all liens except those for general taxes. A portion of the said 1905 Act was declared unconstitutional in a previous case.

HELD: 1. That the provision for the lien and the balance of the Act was not unconstitutional in spite of the legislative omission of the severability clause because said portions were not interdependent upon the part previously declared unconstitutional.

2. Furthermore, the Act is not unconstitutional, for the wording of the Act is germane to the title.

3. Defendant is not estopped for not previously exercising its rights because its lien is by statute made a "continuing lien."

Opinion by Mr. Justice Bakke. Mr. Chief Justice Hilliard and Mr. Justice Bock dissent. EN BANC.

CIVIL SERVICE COMMISSION—ISSUANCE OF CERTIFICATE OF APPOINTMENT—MANDAMUS—DEMAND—PLEADING—*Raymond v. State Civil Service Commission*—No. 14587—*Decided June 12, 1939*—*District Court of Denver*—*Hon. George F. Dunklee, Judge*—*Reversed.*

HELD: 1. It is the duty of the Civil Service Commission to furnish to one who has been a duly appointed, qualified and acting grade B examiner in the Income Tax Department of the State Treasurer's office a certificate that the appointment was made pursuant to law; and it is no defense for the commission to assert that the payroll certified by the State Treasurer was incorrect and did not agree with the records on file with the commission.

2. The difference in the payroll did not affect the right of petitioner to the certificate.

3. "It is elementary that to properly raise a triable issue, an answer must be responsive to the complaint."

4. "* * * To be properly available, a defense must of necessity be against the claim asserted by the plaintiff."

5. A writ of mandamus will not be issued under pleadings which show that no demand was made for the issuance of the certificate.

6. Relator in a mandamus suit must have demanded performance of the act or duty which he seeks to enforce. Where the duty sought to be enforced is of a public nature affecting the people at large and there is no one especially empowered to demand performance, it has been held,

as a well recognized exception to the general rule, that no demand is necessary as a condition precedent to the issuance of a writ of mandamus to compel performance.

7. But, where the duty is of a private nature affecting right of relator only, the general rule, requiring previous demand, applies.

Opinion by Mr. Justice Knous. Mr. Justice Bouck not participating. EN BANC.

NOTES—STATUTE OF LIMITATIONS—*Christensen v. Hugh M. Woods Mercantile Co.*—No. 14589—*Decided June 12, 1939*—*District Court of Denver*—*Hon. Frederic W. Clark, Judge*—*Reversed.*

FACTS: Suit on a note. Defendant pleaded the statute of limitations. Plaintiff alleged certain payments to toll the statute.

HELD: Our statute requires corroboration of payments. Mere book entries are insufficient. The entered credits in this case were without the necessary evidentiary support.

Opinion by Mr. Chief Justice Hilliard. IN DEPARTMENT.
